

**NOT YET SCHEDULED FOR ORAL ARGUMENT**

No. 17-1145

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CLEAN AIR COUNCIL, et al.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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**EPA'S OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR  
A STAY OR, IN THE ALTERNATIVE, SUMMARY VACATUR**

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## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

### **A. PARTIES AND AMICI**

Except for the following, all parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioners. Texas Oil & Gas Association, GPA Midstream Association, Independent Petroleum Association of America, American Exploration & Production Council, Domestic Energy Producers Alliance, Eastern Kansas Oil & Gas Association, Illinois Oil & Gas Association, Independent Oil and Gas Association of West Virginia, Inc., Interstate Natural Gas Association of America, and American Petroleum Institute have moved to intervene.

### **B. RULINGS UNDER REVIEW**

Reference to the agency decision under review appears in the Brief for Petitioners.

### **C. STATEMENT OF RELATED CASES**

Respondents are aware of the following consolidated case related to this matter, which may involve the same or similar issues: *American Petroleum Institute v. EPA*, D.C. Cir. No. 13-1108. This case, and the cases consolidated with it, are presently held in abeyance and challenge the 2016 Rule that is subject to partial reconsideration and partially stayed by EPA's July 5, 2017, decision that is the subject of challenge in this case.

DATED: June 15, 2017

/s/ Benjamin R. Carlisle  
Benjamin R. Carlisle

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## GLOSSARY

2016 Rule	“Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule.” 81 Fed. Reg. 35,824 (June 3, 2016).
AMEL	Alternative means of emission limitation
CAA	Clean Air Act
EPA	The United States Environmental Protection Agency
LDAR	Leak detection and repair
NAAQS	National Ambient Air Quality Standard
NSPS	New source performance standards
Proposed Rule	Proposed rule, Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, 80 Fed. Reg. 56,593 (Sept. 18, 2015).

## STATUTORY BACKGROUND

The Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, creates a comprehensive program for control of air pollution through a system of shared federal and state responsibility. Under Section 111 of the CAA, 42 U.S.C. § 7411, EPA must establish a list of stationary source categories that the Administrator has determined “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” *Id.* § 7411(b)(1)(A). For each category, EPA must set federal “standards of performance” for constructed, modified, and reconstructed sources. *Id.* §§ 7411(a)(2), (b)(1)(B); 40 C.F.R. § 60.15. The standards are referred to as “new source performance standards,” or “NSPS.”

NSPS help states achieve and maintain clean air by setting emission standards for new sources that reflect the degree of emission limitation achieved through the application of the best system of emission reduction that has been adequately demonstrated.<sup>1</sup> *See* 42 U.S.C. § 7411(a)(1); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 434 n.14 (D.C. Cir. 1973). Accordingly, NSPS promulgated under Section 111 apply to all new sources within a category across the United States. 42 U.S.C. § 7411(b)(4). The CAA defines “new source” to include any stationary source for which “construction or modification” of the source is commenced after the

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<sup>1</sup> Emissions standards for existing sources are addressed in 42 U.S.C. § 7411(d).

publication of proposed regulations prescribing the particular NSPS applicable to that source. *Id.* § 7411(a)(2).

## THE CHALLENGED ACTION

EPA issued a notice of proposed rulemaking to set NSPS for certain pollutants emitted from new and modified sources from oil and natural gas facilities on September 18, 2015. 80 Fed. Reg. 56,593 (“Proposed Rule”).<sup>2</sup> On June 3, 2016, EPA finalized the rule, “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule,” 81 Fed. Reg. 35,824 (June 3, 2016) (“2016 Rule”). Among the new standards imposed by the 2016 Rule are the requirements to monitor and control well site and compressor station fugitive emissions, the pneumatic pump standards, as well as closed vent certification by a professional engineer that is required for demonstrating compliance with a number of emission standards. Recognizing that “[i]n recent years, certain states have developed programs to control various oil and gas emissions sources,” EPA also set forth a previously unannounced process through which owners and operators could apply to EPA for approval to use “alternative means of emission limitation.” 2016 Rule at 35,871; Pet. Attach. at 3; 40 C.F.R. § 60.5398a.

On August 2, 2016, EPA received petitions for administrative reconsideration that raised numerous objections to the 2016 Rule. Pet. Attach. at 85-151. In

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<sup>2</sup> The 2015 proposal to establish new standards was a discretionary rulemaking and was not compelled by 42 U.S.C. § 7411(b)(1)(B).

response, on April 18, 2017, EPA alerted the administrative petitioners that it had concluded that certain issues merited reconsideration under 42 U.S.C. § 7607(d)(7)(B). *Id.* EPA further noted that it intended to issue a 90-day stay of the fugitive emission requirements under 42 U.S.C. § 7607(d)(7)(B). Pet. Attach at 154.

On June 5, 2017, EPA published a “notice of reconsideration and partial stay,” 82 Fed. Reg. 25,730 (June 5, 2017), in which it convened a proceeding for reconsideration of four aspects of the 2016 Rule: (1) the applicability of the fugitive emissions requirements to low production well sites; (2) the process and criteria for requesting approval for the use of an alternative means of emission limitation; (3) the requirement that a professional engineer assess and certify “closed vent systems” used to comply with emission standards; and (4) conditions and limitations for a pneumatic pump at a well site to be exempt from the emission control requirement. Pet. Attach. at 3-4.<sup>3</sup> EPA issued a narrow, 90-day stay of the specific requirements associated with the issues under reconsideration: the fugitive emissions requirements, the standards for pneumatic pumps at well sites, and the professional engineer certification requirements. *Id.* at 4-5.

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<sup>3</sup> EPA also noted its intent to “look broadly at the entire 2016 Rule.” Pet. Attach. at 4. EPA has also proposed further stays of certain requirements of the 2016 Rule. <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/epa-proposes-stay-oil-and-gas-standards-two>

Petitioners filed a Petition for Review of EPA's decision to administratively stay these aspects of the 2016 Rule and the present motion for a stay or summary vacatur of EPA's decision on June 5, 2017.

### STANDARD OF REVIEW

A judicial stay of an agency decision is a disfavored remedy. “On a motion for [a judicial] stay, it is the movant’s obligation to justify the court’s exercise of such an extraordinary remedy.” *Cuomo v. United States Nuclear Regulatory Comm’n*, 772 F.2d 972, 978 (D.C. Cir. 1985). The factors for determining whether a judicial stay is warranted are: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party; (3) the possibility of harm to other parties; and (4) the public interest. *Id.* at 974; *see also* Circuit Rule 18. This standard is applied stringently. *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1218 (1972); *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 673-74 (D.C. Cir. 2015). Likewise, “[s]ummary reversal is rarely granted and is appropriate only where the merits are ‘so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court’s] decision.’” D.C. Cir. Handbook of Practice and Internal Proc. at 36 (quoting *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985); “Parties should avoid requesting summary disposition of issues of first impression for the Court.”).

To demonstrate a likelihood of success on the merits, Petitioner must show that it is likely to persuade this Court that EPA’s action is “arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law.” 42 U.S.C. § 7607(d)(9). The “arbitrary or capricious” standard presumes the validity of agency actions, and a reviewing court is to uphold an agency action if it satisfies minimum standards of rationality. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Particular deference is given by the Court to an agency with regard to matters within its area of technical expertise. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).

This deference extends to EPA's interpretation of a statute it administers. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached.” *Chevron*, 467 U.S. at 843 n.11.

## SUMMARY OF ARGUMENT

Petitioners attempt to portray an EPA decision to stay limited portions of the NSPS applicable to the oil and gas industry as an emergency that requires the Court to mandate compliance with the very aspects of the 2016 Rule that may change following reconsideration. There is no emergency and Petitioners have failed to

demonstrate the requirements necessary for a stay or summary vacatur of EPA's decision.

EPA has granted a temporary, three-month stay of discrete provisions of the NSPS articulated in the 2016 Rule. During the stay, EPA will reconsider aspects of the 2016 Rule that relate to the universe of sources that must implement the rule's well site and compressor station fugitive emission requirements ("fugitive emission requirements") and control requirements for well site pneumatic pumps. EPA will also reconsider the new professional engineer certification requirement for closed vent systems.

In reviewing EPA's decision to determine Petitioners' likelihood of success on the merits, the Court is to assess whether it was likely arbitrary and capricious for EPA to issue a stay under 42 U.S.C. § 7607(d)(7)(B) to avoid burdening stakeholders with compliance obligations while EPA allows further public comment and Agency consideration of these limited issues. This appears to be, in substantial part, an issue of first impression.

At the outset, the premise of Petitioners' motion is flawed. EPA has broad discretion to reconsider its rules. It also has broad authority to issue a brief stay under 42 U.S.C. § 7607(d)(7)(B), regardless of whether the statutory criteria for when EPA is *mandated* to reconsider its rules are met. Moreover, EPA's decision fell well within the range of reasonable outcomes that were available to it. Indeed, although Petitioners rely on cases in which EPA permissibly exercised its discretion to refrain from

reconsidering an agency action, they wholly fail to carry their burden to show that it is arbitrary and capricious for EPA to allow additional public input into aspects of the 2016 Rule that EPA found were not practicable to raise during the notice-and-comment period.

Petitioners also have not met their burden to show irreparable harm. On the aspects of EPA's stay relating to the professional engineer and pneumatic pump requirements, they do not even attempt to argue this point. As to the stay of the fugitive emissions requirements, even if Petitioners' factual assertions are taken at face value, they establish only that EPA's stay will result in a small incremental difference in emissions—for example, the methane emission reduction that would result in the absence of the stay is just 0.046% of the annual methane emissions from the oil and gas industry. Nor do Petitioners account for other regulatory regimes that exist to reduce other emissions, such as ozone precursors.

Having failed to carry their burden on the requirements of a stay or summary vacatur of EPA's decision, Petitioners' motion should be denied.

## **ARGUMENT**

### **I. Petitioners Have Not Established that They Are Likely to Succeed on the Merits.**

#### **A. Petitioners' Motion Amounts to a Collateral Attack on EPA's Decision to Allow Reconsideration.**

42 U.S.C. § 7607(b)(1) authorizes judicial review over a discrete list of EPA rulemakings “or final action taken by the Administrator under this chapter.” *See also*

*id.* at § 7607(e). An agency decision to convene reconsideration proceedings is not “final action” subject to judicial review. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997) (agency action must mark the completion of the agency’s decision-making process and have concrete legal consequences); *FTC v. Std. Oil Co.*, 449 U.S. 232, 242 (1980). Convening reconsideration reflects the commencement, not the consummation of an agency process and—standing alone—has no legal effect beyond the burdens of participation.

Nevertheless, Petitioners’ challenge is a sideways effort to attack EPA’s decision to convene reconsideration proceedings, *see* Pet. Br. at 10-13 (arguing that reconsideration was improperly convened), notwithstanding that they cannot (and, therefore, do not) challenge this action directly. Indeed, the practical effect of Petitioners’ attempt to overturn the 90-day stay is to require a large number of facilities to comply with the very provisions of the 2016 Rule that may change following reconsideration. Looking just to the fugitive emissions requirements, by Petitioners’ estimate more than 14,000 wells, *see* Pet. Br. at 26, not to mention compressor stations, will be required to complete a monitoring survey, repair or replace any source of fugitive emissions within 30 days, and resurvey such repairs again within 30 days. 40 C.F.R. § 60.5397a(f), (h)(1)-(3). These facilities will be substantially deprived of the potential benefits of reconsideration: if they are low-production wells, they will be required to comply notwithstanding that status; if they are among the thousands of wells that may be eligible for an alternative means of

emission limitation, they will be subject to immediate compliance with the 2016 Rule and to the current application process on which they are seeking to comment.

**B. Petitioners' Arguments Fail Because They Rely on an Inaccurate, Narrow View of EPA's Authority.**

Petitioners' arguments hinge on the cramped view that EPA only has authority to convene a "reconsideration" proceeding under Section 7607(d)(7)(B) (and therefore stay the effectiveness of the 2016 Rule) and may only do so if, and only if, "two statutory conditions . . . are met." Pet. Br. at 10-11.<sup>4</sup> Section 7607(d)(7)(B) states:

If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator *shall convene a proceeding for reconsideration of the rule . . .*

42 U.S.C. § 7607(d)(7)(B) (emphasis added).

It is a basic principle of administrative law that EPA has "inherent authority to reconsider [its] own decisions." *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980); *see also United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977). This authority is not contingent on meeting any particular statutory conditions and nothing in the text of

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<sup>4</sup> Petitioners concede that "EPA has authority to revisit existing regulations by initiating a new rulemaking," Pet. Br. at 10, but appear to imply that this is not "reconsideration" authority.

Section 7607(d)(7)(B) suggests that it is intended to eliminate or limit this fundamental regulatory authority to convene reconsideration proceedings. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions . . .”).

To the contrary, the statutory text specifies only when EPA “shall” exercise reconsideration authority to convene such a proceeding and does not purport to limit when EPA “may” convene such a proceeding to any set of statutorily defined circumstances. See *Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (“shall” is usually interpreted as the language of command whereas “may” is usually construed as permissive); *Bennett v. Panama Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973).

Moreover, Section 7607(d)(7)(B) contains no prohibitory language (e.g., “shall not” or “may not”) establishing that the situations in which EPA must convene a reconsideration proceeding are the only circumstances in which EPA may convene such proceedings. See *Ma v. Ashcroft*, 257 F.3d 1095, 1112 n.27 (9th Cir. 2001); cf. *Judge v. Quinn*, 612 F.3d 537, 555 (7th Cir. 2010) (contrasting a Connecticut statute which contained the prohibitory language “shall not” with an Illinois statute, which contained no such language). Words in a statute are construed according to their ordinary meaning, *Levin v. United States*, 133 S. Ct. 1224, 1231 (2013), and courts are not to read additional words or limitations into a statute that Congress did not see fit to include, *Kay v. FCC*, 525 F.3d 1277, 1279 (D.C. Cir. 2008).

The context surrounding this provision reinforces that EPA has broad authority to convene a reconsideration proceeding of rules issued under the CAA. *See King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (words of a statute must be read in context). 42 U.S.C. § 7607(d)(7)(B) provides that entities seeking judicial review must raise their objections during the public comment period, but provides an opportunity to raise objections “of central relevance” if they were “impracticable to raise . . . within such time” or “arose after the period for public comment.” By mandating that EPA “shall convene a proceeding for reconsideration of the rule” if these criteria are met, Congress allowed interested parties to compel an open, public process to address such objections, obtain the EPA’s considered judgement, and—if necessary—judicial review. At the same time, by limiting the circumstances in which EPA was mandated to convene reconsideration, Congress precluded parties from requiring that EPA re-open the public process to address all after-the-fact objections. Nothing in this context suggests that Congress intended to restrict EPA’s authority to correct errors or improve its rulemaking on its own initiative.

The CAA provides that “[t]he effectiveness of the rule [*i.e.*, a rule governed by Section 7607] may be stayed during *such reconsideration* . . . for a period not to exceed three months.” 42 U.S.C. § 7607(d)(7)(B) (emphasis added).<sup>5</sup> Although “such

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<sup>5</sup> CAA Section 7607(d)(7)(B) is not EPA’s only source of authority to stay a rule. Other authority includes that under 5 U.S.C. § 705 and through notice and comment rulemaking. *See, e.g., Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 561-62 (2015) *Cont.*

reconsideration” may be subject to more than one interpretation, there is good reason to conclude that Section 7607(d)(7)(B) authorizes EPA to issue a short-term stay whether or not reconsideration was mandatory. To begin, the phrase “such reconsideration” is reasonably read to refer to the discrete corresponding clause “a proceeding for reconsideration of the rule.” *Id.* “Such reconsideration” is subject to no straightforward limitation, notwithstanding that Congress easily could have provided, for example, that a stay is available only when “such reconsideration is required by law.” *See City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (“Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”).

Moreover, the CAA specifies that “[t]his subsection [7607(d)] applies” broadly to the “promulgation *or revision*” of a wide variety of EPA actions under the CAA, including “any standard of performance under section 7411.” 42 U.S.C. § 7607(d)(1) (emphasis added). EPA’s authority to issue a three-month stay is a component of its authority under subsection 7607(d). By specifying that subsection 7607(d) applies broadly to the revision of NSPS, the statutory text suggests that Congress did not intend to cabin EPA’s authority to issue a stay to only those circumstances where EPA is *mandated* to convene reconsideration proceedings to consider revising a rule.

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(Kavanaugh, J., dissenting in part); *id.* at 558 (declining to reach EPA’s authority under 5 U.S.C. § 705); *Natural Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 39 (D.C. Cir. 1992) (declining to address EPA’s authority to issue a stay through rulemaking under the APA). These other sources of authority are not at issue in this case.

This interpretation of Section 7607(d)(7)(B) provides EPA uniform authority to convene an open, public process to receive comments on and rectify issues in its CAA rulemakings before the burdens of any such errors are imposed on the regulated community. In contrast, the alternative reading of Section 7607(d)(7)(B) forecloses EPA's ability to issue this short-term stay—requiring immediate compliance with a rule that all parties, including EPA, may believe is defective—where the deficiencies were not “impracticable to raise” during the comment period. On Petitioners' view, if EPA mistakenly ignored or misinterpreted crucial information provided during the comment period, it has no authority to issue this three-month stay of compliance with the defective rule that resulted. This could force the regulated community to comply with the rule while engaged in litigation or wait for EPA to commence and complete a full rulemaking correcting the error, by which time it may be too late and reconsideration may effectively have been defeated. *See* Pet. Br. at 12-13; *see also supra* at 7-8. In contrast, if the same objection arose *after* the comment period closed, a stay of compliance would be available.

There is no reason to believe that Congress intended to create such disparate compliance regimes for the regulated community. The same rationale applies to allowing a stay under either circumstance: affording EPA an opportunity to solicit further comment on the perceived error while avoiding the burdens of compliance and while seeking to avert possible litigation.

Because EPA has broad authority to convene reconsideration proceedings and issue a stay, Petitioners have failed to show a likelihood of success on the merits. In this case, EPA looked to the statutory factors in concluding that reconsideration was appropriate and, as described below, reasonably concluded that it was. However, strict adherence to these factors is not a requirement for convening reconsideration or granting a short-term stay. Section 7607(d)(7)(B) prescribes a *minimum* public process that EPA must afford, not a *maximum*. Moreover, under section 7607(d)(7)(B), EPA has authority to stay a rule during reconsideration proceedings. The Supreme Court's seminal decision in *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544-45 (1978), is in accord, explaining that courts should generally defer to agencies and allow them to fashion their own rules of procedure and methods of inquiry.

*Natural Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 40 (D.C. Cir. 1992), is not to the contrary.<sup>6</sup> Although Petitioners latch onto the statement in that case that Congress permitted a stay under Section 7607(d)(7)(B) in “carefully defined circumstances,” *id.*, that case did not specify or even have cause to consider the circumstances under which such a stay could issue. The question in *NRDC v. Reilly* was whether a separate provision of the CAA, Section 112(d)(9), 42 U.S.C. § 7412(d)(9), provided EPA authority to grant an *additional* stay, beyond the three

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<sup>6</sup> Neither is the out-of-circuit decision in *Chevron U. S. A., Inc. v. EPA*, which simply discussed the circumstances under which that the Administrator was mandated, rather than permitted, to convene reconsideration. 658 F.2d 271, 274 (5th Cir. 1981).

months provided by Section 7607(d)(7)(B), in a situation where EPA had a nondiscretionary obligation to promulgate standards under a specific schedule. *See id.* at 37-41. The criteria for invoking Section 7607(d)(7)(B) itself were not at issue.

**C. Even Adopting Petitioner's Narrow View of EPA's Authority, Reconsideration Was Appropriately Granted.**

Petitioners also have not carried their burden of demonstrating that it was arbitrary and capricious for EPA to conclude that the petitions raised issues meeting the criteria articulated in CAA Section 7607(d)(7)(B). Instead, they attempt to evade that standard by arguing that the ordinary deference courts must afford to EPA does not apply. Pet. Br. at 14 n.9; *see also id.* at 14-22.

The standard of review is specified by statute: the Court may not set aside EPA's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9) (noting other bases to do so which are not at issue here). Although courts are at their "most deferential" when an agency evaluates scientific or technical matters, *see, e.g., Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983), the arbitrary and capricious standard applies broadly and generally requires only that the agency decision be "reasonable and reasonably explained." *Cmtys. for a Better Env't v. EPA*, 748 F.3d 333, 335 (D.C. Cir. 2014); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The questions presented here are factual in nature and fall with EPA's special expertise to

assess the scientific and other issues in the comments it received and determine what issues were, could have, and could not have been raised.

The cases Petitioners cite with respect to the “logical outgrowth” test, Pet. Br. at 12, considered whether the final result of EPA’s analysis was sufficiently tied to its proposed rule that the agency was not *required* to convene reconsideration (in other words, whether EPA reasonably denied reconsideration).<sup>7</sup> They did not involve judicial review of whether the agency reasonably decided to *allow* further public process based on the statutory criteria, an issue as to which the EPA has discretion to determine whether an adequate showing has been made. *See* 42 U.S.C. § 7607(d)(7)(B) (reconsideration mandated if “[i]f the person raising an objection can *demonstrate to the Administrator*” that the criteria are met (emphasis added)). This appears to be an issue of first impression.

Applying the arbitrary and capricious standard, there are generally a range of reasonable outcomes that an agency could permissibly reach. Indeed, in close cases EPA could reasonably decide to grant reconsideration or reasonably decide to deny it on the same set of facts. The Court is not to second-guess the agency as to the best outcome but merely to determine if the agency reached a permissible decision. *C&W*

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<sup>7</sup> In fact, many of Petitioners’ cases do not address at all whether reconsideration was allowable, mandated, or even requested, but rather consider the separate issue of whether EPA provided adequate notice-and-comment procedures. *See, e.g., City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007); *Husqvarna AB v. EPA*, 254 F.3d 195, 203 (D.C. Cir. 2001); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000).

*Fish Co. v. Fox*, 931 F.2d 1556, 1565 (D.C. Cir. 1991). Here, EPA has determined to allow greater public process in light of the issues the administrative petitioners raised.

**1. EPA Reasonably Granted Reconsideration With Respect to Its Newly Articulated Rationale Not to Exempt Low-Production Wells.**

EPA proposed to exclude low production well sites from the standards for fugitive emissions from well sites because it believed that “lower production associated with these wells would generally result in lower fugitive emissions,” and solicited comment on this proposal. Proposed Rule at 56,639. In the 2016 Rule, however, EPA took the opposite approach and subjected low-production wells to the emission standards it developed because “stakeholders indicated that well site fugitive emissions are not correlated with levels of production, but rather based on the number of pieces of equipment and components.” 2016 Rule at 35,856.

In granting reconsideration, EPA noted that “the final rule differs significantly from what was proposed in that it requires these well sites to comply with the fugitive emissions requirements based on information and rationale not presented for public comment during the proposal stage. . . . It was therefore impracticable to object to this new rationale during the public comment period.” Pet. Attach. at 3. In particular, the rationale for EPA’s decision not to exempt low-production wells from the 2016 Rule is potentially in tension with EPA’s rationale for specifying what constitutes a “modified” source subject to the 2016 Rule. The 2016 Rule provides that a “modification” of a well site that will render the site subject to the NSPS occurs

when “(i) A new well is drilled at an existing well site; (ii) A well at an existing well site is hydraulically fractured; or (iii) A well at an existing well site is hydraulically refractured.” 40 C.F.R. § 60.5365a(i)(3)(iii). In responding to comments on the definition of “modification,” EPA justified this definition by explaining that fugitive emissions after drilling a new well, fracturing, or refracturing would be expected to increase *based on the increase in production*:

These events are followed by production from these wells which generate additional emissions at the well sites. Some of these additional emissions will pass through leaking fugitive emission components at the well sites (in addition to the emissions already leaking from those components). Further, it is not uncommon that an increase in production would require additional equipment and, therefore, additional fugitive emission components at the well sites.

2016 Rule at 35,881. This potential inconsistency is precisely the issue that IPAA, one of the administrative petitioners, pointed out in its request for reconsideration. Pet. Attach. at 139.

Regardless of whether EPA solicited or received general comments on the proposed exemption for low-production wells or the relationship between production, equipment, and emissions, it was reasonable for EPA to conclude that the administrative petitioners would not have expected EPA to announce in the 2016 Rule a result that is arguably internally inconsistent. EPA’s determination to convene reconsideration and allow public input on this issue exceeds the “minimal standards of rationality” applied in conducting arbitrary and capricious review. *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 520-21.

**2. EPA Reasonably Granted Reconsideration to Solicit Public Involvement on its Alternative Means of Emission Limitation Application Process and Criteria.**

The Proposed Rule indicated that certain owners and operators of oil and natural gas facilities may already be implementing fugitive emissions monitoring and repair programs that were equivalent to, or more stringent than, EPA's proposed standards. Proposed Rule at 56,638. As a result, EPA solicited comment on the "criteria" that EPA could "use to determine whether and under what conditions" fugitive emission sources meet the equivalent of the NSPS. *Id.* At no point in the Proposed Rule did EPA suggest that it was considering adopting a specific application process for determining whether a facility may employ certain work practices as an alternative means of emission limitation in lieu of the fugitive emissions requirement.

Rather than finalizing "criteria" for determining equivalency, in the 2016 Rule EPA disclosed for the first time a process by which owners and operators could apply to EPA for approval that their facilities may employ controls qualifying an alternative means of emission limitation in lieu of meeting the 2016 Rule's requirements. 2016 Rule at 35,871; *id.* at 35,906 (40 C.F.R. § 60.5398a). The process required the submission of 12 months of verified test data and a host of other information regarding the emissions limitation method, 40 C.F.R. § 60.5398a.

Petitioners argue that EPA cannot *sua sponte* grant reconsideration related to this previously unannounced application process. This assertion is wrong as a matter of law: EPA has inherent authority to convene reconsideration proceedings. *See supra*

at 9-10. But even if Petitioners were correct on the law, they are wrong on the facts. Among the “issues for which TXOGA request[ed] reconsideration” was that EPA should provide a simpler process than that provided in the 2016 Rule for alternative means of emission limitations. Pet. Attach. at 148-49 (adopting API’s petition with respect to the issues on which TXOGA sought reconsideration); *see also id.* at 89, 105-06 (API’s petition).

The administrative petitioners provided comments on the previously undisclosed process reached by EPA suggesting that revisions may need to be made to establish its scope and legal effect. *See* Pet. Attach. at 3. Unaware that EPA was considering a process like the one it adopted in lieu of setting criteria for determining equivalency, that process was not subject to public discussion and leaves substantial questions unresolved. For example, “once an AMEL has been approved, can it be used by anyone operating in [the] state?” Pet. Attach. at 105-06. Similarly, the public was not on notice to provide input on who would be permitted to submit applications and the effects of a state modification of a state fugitive emissions program. It was not arbitrary and capricious for EPA to determine that it was not practicable to comment on an application process that no one had seen or knew EPA was considering. *Cf., e.g., Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (commenters are not required to “divine the agency’s unspoken thoughts”). Indeed, EPA’s practice for establishing similar processes in the past has been to propose the

process prior to rulemaking. *See, e.g.*, 49 Fed. Reg. 29,698, 29,717 (July 23, 1984); 46 Fed. Reg. 1,136, 1,156 (Jan. 5, 1981).

EPA's decision to allow further public process on the alternative means of emission limitation procedures is the only area in which Petitioners specifically and distinctly argue that the issues identified by the administrative petitioners are not of "central relevance" to the 2016 Rule. Pet. Br. at 20. But a party that can demonstrate that it is implementing an alternative means of emission limitation may be excused from multiple provisions of the NSPS, including the fugitive emissions requirements, *see* 40 C.F.R. § 60.5398a(a), such that the alternative means of emission limitation program in large part "determine[s] the universe of affected facilities." Pet. Attach. at 3. Administrative petitioners' comments, in turn, address how that program functions, including whether each well (of the thousands that Petitioners identify) must submit a separate application, supported by a year of verified test data, to be excused from these provisions. Moreover, the alternative means of emission limitation provisions were added to serve the important interest of ensuring that the NSPS complemented existing state programs and encouraged use of emerging technology. 2016 Rule at 35871.

It is no way arbitrary and capricious for EPA, before parties incur compliance costs or pursue litigation, to allow reconsideration and take public comment rather than set that process in stone without public input. *See* Pet. Attach. at 3. Doing so was squarely within the range of reasonable outcomes available to EPA.

**3. EPA Reasonably Granted Reconsideration of the Professional Engineer Certification Requirements and Pneumatic Pump Requirements.**

As noted below, Petitioners' failure to even attempt to show that EPA's stay of the professional engineer certification requirements or pneumatic pump requirements will result in irreparable harm is, in itself, adequate basis to deny their motion as to these aspects of EPA's stay. *See infra* at 26. Regardless, Petitioners have also failed to demonstrate a likelihood of success on these issues.

EPA articulated several well-supported reasons to convene reconsideration of the pneumatic pump standards. In the Proposed Rule, EPA proposed that owners and operators be required to route pneumatic pumps through a control device, Proposed Rule at 56,610, 56,666; *see also* Pet. Attach. at 4, but never suggested or solicited comment on any exemption to that requirement. Similarly, although API requested that a technical infeasibility exemption be added to the final rule, Pet. Attach. at 181, 188, the scope and parameters of this exemption were never subject to public notice or comment. As a result, the technical infeasibility exemption that EPA announced in the 2016 Rule adopted a different approach than previously applied to the oil and gas industry and created an unanticipated and unnoticed distinction between "greenfield" (new development) and "brownfield" sites. 2016 Rule at 35,844-45; Pet. Attach. at 4. Administrative petitioners sought, and EPA allowed, reconsideration to provide a public process to discuss and provide clarity on the appropriate parameters of the exemption. *See* Pet. Attach. at 91-93 (providing

comments that API would have raised had EPA provided notice as to its intended scope of the exemption).

Similarly, although EPA solicited comment on the “criteria by which the PE verifies that the closed vent system is designed to accommodate all streams routed to the facility’s control system,” Proposed Rule at 56,649, it did not directly provide for review, propose to conduct, or conduct an assessment of the costs of this requirement, as opposed to the overall costs of the rule. Pet. Attach. at 4. Petitioners do not meaningfully dispute this point, offering only a generalized assertion regarding the “thoroughness of the agency’s assessment of the 2016 Rule’s overall costs.” Pet Br. at 21. Administrative petitioners requested reconsideration based on EPA’s alleged omission, Pet. Attach. at 91-92, 141-42, leading EPA to convene reconsideration on this issue in light of the requirement in CAA, 42 U.S.C. § 7411, that EPA consider costs in establishing NSPS.

If EPA had denied reconsideration of the professional engineer requirement and pneumatic pump standards, that denial likely would not have been arbitrary and capricious. The Court, however, is reviewing the mirror-image situation: whether EPA may rationally decide that the public comment process was hampered by its failure to propose or conduct a cost analysis and the differences between the proposed and final rule, and fix any such error while considering administrative petitioners’ comments in a reconsideration proceeding. It was reasonable for EPA to determine that the administrative petitioners could not have predicted that EPA

would have entirely failed to conduct a cost analysis of the professional engineer requirement and that their ability to object on this point was impaired.<sup>8</sup> It was likewise reasonable for EPA to conclude that further public input on the pneumatic pump standards was appropriate.

**D. The Stay Was Appropriate in Scope and Adequately Justified**

EPA has issued a stay limited in scope to the specific issues as to which it has granted reconsideration: the fugitive emissions requirement, the professional engineer requirements, and the standards for pneumatic pumps at well sites. Pet. Attach. at 4. As to the latter two elements of the stay, Petitioners do not argue that the stay is overbroad. Pet. Br. at 23-25. As to the stay of the fugitive emissions requirement, as already noted the matters under reconsideration “determine the universe of sources that must implement the fugitive emissions requirements.” Pet. Attach. at 4. By Petitioners’ estimate, there are thousands of wells (whether low or high production) in states with existing fugitive emissions programs that may be able to apply for alternative means of emission limitation, but the application process leaves it unclear whether each must apply to EPA separately. Moreover, the alternative means of emission limitation process applies not just to well sites, but also to compressor stations, rendering a stay of the fugitive emission requirements appropriate as to these

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<sup>8</sup> Petitioners suggest that this error would not be a reasonable basis to revise the rule, but do not disagree that EPA is required to consider costs; neither do they argue that this requirement would remain a component of the NSPS if EPA concluded it was not cost-justified.

components as well. 40 C.F.R. § 60.5398a. That EPA has granted reconsideration as to whether it is appropriate to exempt low-production wells further renders indeterminable the breadth of facilities that will need to comply with any fugitive emissions requirements in the NSPS. The district court's decision in *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33 (D.D.C. 2012), is thus inapposite because the stay is well-grounded in and proportionate to the issues under reconsideration.

Petitioners also attempt to import the requirements for a *judicial* stay into EPA's authority to issue a stay pending reconsideration in arguing that EPA's decision was not adequately explained. Pet. Br. at 24. But nothing in the text of CAA Section 7607(d)(7)(B) imposes any such requirements, and the relatively short (three-month) duration of a stay issued under this provision suggests that Congress left EPA greater discretion to issue a stay as it determines appropriate. The reasons for a stay here are self-evident—as discussed above, in the absence of a stay, thousands of wells would be required to comply with the very requirements that are subject to reconsideration and may be substantially altered. *See supra* at 8. These issues go to core elements of the 2016 Rule. Pet. Attach. at 4-5. And, as discussed below, the alleged harm resulting from the stay is, at most, incremental. *See infra* at 27-28.

**II. Petitioners Have Not Demonstrated that They Will Suffer Irreparable Harm in the Absence of a Stay.**

**A. Petitioners Have Not Even Attempted to Demonstrate that EPA's Stay of the Pneumatic Pump Standards or Professional Engineer Requirements Will Cause Irreparable Harm.**

The entirety of Petitioners' allegations of irreparable harm are focused on their contention that EPA's stay of the fugitive emissions requirements will result in greater emissions than would occur in the absence of a stay. Pet. Br. at 25-31. Having not even attempted to argue that irreparable harm will result from EPA's stay of the standards for pneumatic pumps or professional engineer certification requirements, Petitioners have waived their ability to do so. *Petit v. USDE*, 675 F.3d 769, 779 (D.C. Cir. 2012). This failure is sufficient basis, standing alone, for the Court to deny Petitioners' motion with respect to these aspects of EPA's stay of the 2016 Rule. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008); *Nken v. Holder*, 556 U.S. 418, 438 (2009) (Kennedy, J., concurring).

**B. Petitioners Have Not Shown that EPA's Stay of the Fugitive Emissions Requirement Will Result in Irreparable Harm.**

As to the fugitive emissions requirement, Petitioners do not demonstrate that any substantial irreparable harm is likely as a result of the three month stay. To establish irreparable harm, a petitioner must demonstrate an injury that is "both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co*, 758 F.2d at 674. The petitioner must show that "[t]he injury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent

irreparable harm.” *Id.* (citation omitted). The movant must “substantiate the claim that irreparable injury is ‘likely’ to occur,” and “show that the alleged harm will directly result from the action which the movant seeks to enjoin.” *Id.*

At the outset, in purporting to calculate the emissions effects of EPA’s stay, Dr. Lyon recognizes that he must adjust for emission controls associated with state leak detection and repair standards. Pet. Attach. at 38-39. In doing so, Dr. Lyon does not necessarily follow the methodology that EPA would adopt to determine which states might be excluded from an analysis of emission reductions. Regardless, even on the terms of his own analysis he makes no adjustment to account for the leak detection and repair program in the state that has, by far, the largest number of wells: Texas. Between 2011 and 2015, 48% of natural gas producing oil wells and 25% of producing natural gas wells in the United States were located in Texas. *See* Resp. Attach at 081, 083; *cf.* Pet. Attach at 42-43. Texas has mandated a leak detection and repair program to curb fugitive emissions. *See* Resp. Attach at 148-54 (Table 9; requirements for facilities in the Barnett Shale region); 30 Tex. Admin. Code §§ 116.601-615, 116.620 (requirements for facilities outside the Barnett Shale region). It is not clear why Dr. Lyon overlooked the emission reductions achieved by Texas’s program, but as a result, his emissions analysis is internally inconsistent and, applying his own criteria, substantially inflated.

More fundamentally, although Petitioners attempt to paint the consequences of EPA’s 90-day stay as a dire emergency, the brief stay of the 2016 Rule will result in

only an incremental difference in emissions. For example, even accepting Dr. Lyon's inflated emissions calculations as accurate, he predicts that the stay will result in 4,301 tons<sup>9</sup> of methane emissions from wells in states with no leak detection and repair requirements. Pet. Attach. at 47-48. Natural gas and petroleum systems—standing alone—emitted 9,295,000 tons of methane in 2014. 2016 Rule at 35,838-39. Put in context, the 90-day stay will thus account for roughly 0.046% of annual methane emissions from this single subsector of United States industry. The same point holds for other sources or types of fugitive emissions, such as ozone precursors, that Petitioners' in-house scientists assess. As a result, Petitioners do not, and cannot, establish that EPA's three-month stay will have a meaningful impact on the environment generally, global climate change in particular, ambient ozone in a particular area, or human health.<sup>10</sup>

Petitioners also neglect to address other existing regulatory regimes to curb the emissions that they identify. For example, as to the emission of ozone precursors, there is a separate program pursuant to which EPA sets National Ambient Air Quality Standard ("NAAQS") for ozone, 40 C.F.R. § 50.19. NAAQS are set at a level requisite to protect public health with an adequate margin of safety. 42 U.S.C. §

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<sup>9</sup> Petitioners' brief actually *quadruples* the emissions associated with the stay by citing Dr. Lyon's calculation of annual emissions as the amount that would be emitted during the 90-day stay. Compare Pet. Br. at 26 with Pet. Attach. at 47 (Table 3).

<sup>10</sup> The 2016 Rule did not suggest that fugitive emissions needed to be addressed on an emergency basis to avoid irreparable harm, allowing as it did for a year-long initial compliance period. 2016 Rule at 35,858-59.

7409(b)(1); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Under the CAA, States have primary responsibility for ensuring that ambient air quality meets the NAAQS in areas under their jurisdiction. 42 U.S.C. § 7407(a). For each pollutant, each State must draft and adopt a state implementation plan (“SIP”) that provides for the implementation, maintenance, and enforcement of the NAAQS, and must submit the adopted SIP to EPA for review. 42 U.S.C. § 7410(a). As a result, States are already leading an effort to reduce the emissions of ozone precursors to ensure attainment and should ensure that a SIP is in place to address such issues. While the 2016 Rule may facilitate emission reductions on this point, it is not the only—or even the principal—method of achieving reduction of ambient ozone.

### **III. Petitioners’ Stay Motion Will Cause Harm to Others and Will Not Serve the Public Interest.**

The harm to others and the public interest, balanced against the incremental emissions increases Petitioners rely on, also militate in favor of denying Petitioners’ motion. As already noted, *see supra* at 8, Petitioners essentially seek to require roughly 14,000 wells to immediately comply with the very provisions of the 2016 Rule that may be subject to change in reconsideration. Both EPA and the public—not to mention Petitioners, who are free to submit comments during reconsideration—have an interest in assuring that regulations are subject to meaningful public input and reflect EPA’s best-considered judgment. *See, e.g., Yakus v. United States*, 321 U.S. 414, 437 & n.5, 440 (1944) (noting the public interest in a “centralized, unitary scheme of

review” of the relevant regulations); *Hankins v. Norton*, 2005 U.S. Dist. LEXIS 37741, at \*43-44 (D. Colo. Sept. 2, 2005) (“The public has a generalized interest in having administrative matters resolved in an orderly fashion, and by an agency having the expertise and discretion to deal competently and expeditiously with such matters.”).

Petitioners claim that a stay of EPA’s action would be in the public interest because of the alleged harm to the environment that they speculate would result from EPA’s stay of the rule. However, the public has a wide range of interests. Congress recognized the competing public interests when it identified, as goals of the CAA, protecting the “productive capacity of [the nation’s] population,” 42 U.S.C. § 7401(b)(1), and “[insuring] that economic growth will occur . . . consistent with the preservation of existing clean air resources,” 42 U.S.C. § 7470(3). EPA’s short-term stay strikes a balance among these interests by allowing the Agency to consider whether to refine aspects of the 2016 Rule to better account for issues that the Agency did not consider and concerns among the regulated community that EPA did not foresee.

Attempting to minimize the burdens of compliance with the 2016 Rule, Petitioners imply that initial compliance costs are “\$250 per well.” Pet. Br. at 32. This low-end estimate is simply the cost for an initial survey of a well and, in assessing the 2016 Rule, EPA documented substantially higher compliance costs. *See* Resp. Attach. at 178-90 (describing the variety of costs that overall compliance with the fugitive emissions and repair requirements would impose). These costs are anything but

trivial—running into the millions or tens of millions of dollars—when multiplied across the thousands of wells that may need to comply prematurely with a regulation that is potentially subject to significant change. The harm to others and balance of the equities favor denying Petitioners’ motion.

### CONCLUSION

For all of the foregoing reasons, Petitioners’ motion for a stay or, in the alternative, summary vacatur should be denied.

Respectfully submitted,  
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**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and District of Columbia Circuit Rule 18(b) because it contains 7,794 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

*s/ Benjamin R. Carlisle*  
\_\_\_\_\_  
BENJAMIN R. CARLISLE

**CERTIFICATE OF SERVICE**

I hereby certify that on June 15, 2017, I electronically filed the foregoing Brief for Respondents United States Environmental Protection Agency, et al., with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

*s/ Benjamin R. Carlisle*  
\_\_\_\_\_  
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